United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1039

To be argued by
ROBERT J. COSTELLO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1039

UNITED STATES OF AMERICA,
Appellee,

—v.—

CARLOS VALLE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT J. COSTELLO,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

STATUTES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1039

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARLOS VALLE,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Carlos Valle appeals from a judgment of conviction entered on January 15, 1976, in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable Milton Pollack, United States District Judge, and a jury.

Indictment 75 Cr. 857, filed August 27, 1975, charged Valle in one count with threatening to take the life of, and to inflict bodily harm upon, the President of the United States, in violation of Title 18, United States Code, Section 871.

The trial commenced on December 3, 1975, and concluded on December 4, 1975, when the jury returned a guilty verdict.

On January 15, 1975, Judge Pollack sentenced Valle to imprisonment for one year, with due credit for time already served.

Statement of Facts

The Government's Case

The proof at trial established that on August 17, 1975, Carlos Valle dialed the New York City Police Emergency Telephone Number 911 and threatened to kill the President of the United States.* (GX 1; Tr. 51).** During the course of that conversation, Valle told the Police Emergency Operator that Carlos Valle lived in Apartment 10F at 1115 F.D.R. Drive. He further stated that Valle was about 24 or 25 years old and a member of the Communist Party and that he wanted to kill the President of the United States, as well as blow up Federal buildings.

United States Secret Service Agent Lon Warfield, together with other agents, arrested the defendant Carlos Valle on August 18, 1975. (Tr. 26). Following that arrest, the defendant was immediately brought to Secret Service Headquarters and was read his constitutional rights from a Secret Service Form. The defendant was then given the form, and asked to read it and sign it. (Tr. 28). The defendant signed the top part of the form

---

* The Government's proof on the issue of identity consisted of playing for the jury Government's Exhibit 1, a tape recording of the questioned call, Government's Exhibit 2, a tape recorded voice exemplar of Valle, and Government's Exhibit 3, a composite tape recording consisting of a phrase from Government's Exhibit 1 followed by the same phrase from Government's Exhibit 2.

** "GX" refers to Government Exhibits; "DX" to defense exhibits; "Tr." to the trial transcript; and "Br." to Valle's Brief.

but declined to sign the bottom half, a waiver of rights. (Tr. 28, 32, 34, 42).* The defendant was then interviewed by agents of the Secret Service.

During the course of that interview, Valle denied making the threatening telephone call. (Tr. 29, 34, 36). However, shortly after denying that he had made the call, Valle asked to be released from custody and stated that, if he were released, he did not think there would be any more telephone calls. (Tr. 29). In addition, during the course of the interview, Valle was questioned concerning possible affiliations he might have with a Puerto Rican liberation organization known as the F.A.L.N. (Tr. 29). He stated that while he had not been involved in any F.A.L.N. terrorist activities, he strongly supported the organization's actions. Valle also stated that, if the F.A.L.N. thought it would assist their cause for the President to be killed and if the group wanted him to do it, he would kill the President. (Tr. 30, 40). Valle further stated that he believed it would assist the cause of the F.A.L.N. for the President to be killed. (Tr. 30, 40).

The Defense Case

The defense case consisted of a personal history form of the defendant filled out by Agent Warfield and a stipulation of fact. (Tr. 53; DX B). The stipulation of fact was to the effect that Carlos Valle was 28 years

---

* The form is entitled "Warning and Consent to Speak", but is more popularly known as a "Warning and Waiver of Rights" and consists of two sections. The upper part of the form contains the *Miranda* warnings with a signature line directly underneath them. The lower half of the form contains a "Waiver" section that states in substance that the defendant does not want a lawyer and that he or she wants to make a statement. Directly beneath the lower section is another signature line.

old and that his name did not appear on any known list of members of the Communist Party. It was further stipulated that the defendant's grandmother resided in Apartment 10G at 1115 F.D.R. Drive, New York, New York, and that Carlos Valle voluntarily furnished a voice exemplar at the U d States Attorney's Office by reading from a prepared script into the telephone. (Tr. 54).

ARGUMENT

POINT I

The statements concerning the F.A.L.N. were clearly admissible to prove motive and intent.

Defendant contends that the testimony of Agent Warfield concerning the defendant's relationship with the F.A.L.N. was inadmissible, since it was not necessary for the Government to prove that the defendant intended to carry out his threat to the life of the President. Defendant's argument completely misses the point.

It is certainly correct that neither intent to carry out the threat nor a present ability to do so are elements of a § 871 offense. *United States* v. *Compton*, 428 F.2d 18 (2d Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971); *United States* v. *Hall*, 493 F.2d 904, 905 (5th Cir. 1974); *United States* v. *Rogers*, 488 F.2d 512, 514 (5th Cir. 1974), *rev'd on other grounds*, 420 U.S. 943 (1975); *United States* v. *Lincoln*, 462 F.2d 1368, 1369 (6th Cir.), *cert. denied*, 409 U.S. 952 (1972); *United States* v. *Hart*, 457 F.2d 1087 (10th Cir.), *cert. denied*, 409 U.S. 861 (1972); *Roy* v. *United States*, 416 F.2d 874, 877-78 (9th Cir. 1969). However, it is necessary for the Government to prove (1) that the defendant uttered the threat; (2) that the threat was a "true" threat, not mere political hyperbole; and (3) that the threat was uttered wilfully,

that is, voluntarily, knowingly and intentionally. *United States* v. *Compton*, *supra*, 428 F.2d at 22. A true threat is made wilfully only if the speaker comprehends his words and voluntarily and intelligently utters them as a declaration of an apparent intent to carry out the threat. *United States* v. *Compton*, *supra*. The statements uttered must not be the result of a mistake, duress or coercion nor can they have been uttered idly or in jest. *Id.*

The District Court properly admitted the testimony concerning the defendant's sympathies with the F.A.L.N., because that testimony was clearly relevant and material to the questions, first, whether the defendant made the call in question and second, if so, whether he intended his call to be taken seriously. (See Tr. 30).*

The fact that Valle stated that he supported the F.A.L.N., that he would kill the President if the F.A.L.N. wanted him to, and that he believed it would help the F.A.L.N. for the President to be killed (Tr. 30, 40), clearly showed a motive for making the calls. Proof of motive was certainly relevant, since the jury could properly have inferred that Valle's political views made him far more likely than most persons to threaten the life of the President. See, *e.g.*, *Haupt* v. *United States*, 330 U.S. 631, 642 (1947); *United States* v. *Johnson*, 254 F.2d 175 (2d Cir. 1958); *United States* v. *Rosenberg*, 195 F.2d 583, 595-96 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1953); Fed. R. Evid. 401, 402, 404(b).

Similarly, this proof was properly admissible as shedding a good deal of light on the seriousness and wilfulness of Valle's threats. *United States* v. *Reid*, 149 F. Supp. 313, 318 (W.D. La.), *aff'd*, 136 F.2d 476 (5th

---

* Judge Pollack noted this in his charge to the jury. (Tr. 80, 82).

Cir.), *cert. denied*, 320 U.S. 775 (1943). In *Reid*, a case involving threats against the President, the Court was faced with the same situation as in the present case and observed:

> "In the course of the trial of the present case counsel for the defendant objected strenuously several times to the Court's permitting the prosecution to prove other statements and instances wherein the sympathy of the accused with the German cause was displayed. As stated then, *it was thought that this was admissible to show intent or the state of defendant's mind as to the wilful and serious nature of the statement, as against idle talk or joking.*" 149 F. Supp. at 318 (emphasis supplied).

Valle's reliance on *United States* v. *Collazo*, 196 F.2d 573 (D.C. Cir.), *cert. denied*, 343 U.S. 968 (1952) is utterly misplaced; indeed, the significance of *Collazo* is in the support it provides for the Government's position. In *Collazo* the defendant had taken the stand and admitted that, by agreement, he and another man had fired weapons at close range at White House guards. The defendant's shots had not killed anyone, but his partner's shots had. The defendant, who was on trial for murder as an aider and abettor, claimed that the District Court should have permitted the jury to consider his views on contemporary conditions in Puerto Rico in determining whether his agreement with his partner encompassed murder. The Circuit Court rejected this claim holding that proof of motive was entirely irrelevant to the only significant legal issue in the case, namely, did the agreement of the two men include the probability of killing someone. The court stated:

> "It seems to us, as it did to the trial court, that the views of the two confederates concerning Puerto Rico were irrelevant or immaterial, or both, to the issue whether their contemplated demonstration did or did not include a purposed or intended

> killing. To have let the jury speculate, without instruction, on the applicability and effect of that evidence would have been an erroneous neglect by the judge of his duty to instruct upon such matters as matters of law." *Id.* at 581.

The *Collazo* court did not, as Valle seems to suggest, hold that proof of motive could never be admissible. On the contrary, the court stated that, if the accused had denied participation in the crime, proof of motive would have been properly introduced to buttress the Government's proof of the defendant's involvement. 196 F.2d at 578. The Court's holding therefore was simply that, in the unique circumstances of that case, proof of motive was wholly irrelevant to any disputed issue. *Id.* at 581.

Collazo certainly indicates that where, as in the instant case, the defendant denies participation in an offense, proof of the defendant's motive to commit the crime is admissible.

POINT II

The District Court properly denied defendant's motion for a mistrial.

During the trial, the Government called Secret Service Agent William Lometti as a witness to identify Valle's voice on the tape recording of the threatening telephone call. Lometti's testimony was eventually struck by the trial court, because of the inadvertent destruction of a tape recording which had the effect of restricting Lometti's cross-examination. Valle contends that, rather than striking the testimony, the District Court should have exercised its discretion to grant a mistrial. This claim is meritless.

On direct examination, Agent Lometti testified that he had spoken to Valle on three occasions in the past. The first time was in April of 1973 and then twice again in April of 1975. (Tr. 12, 13). Lometti then listened to Government's Exhibit 1, a tape recording of the unknown call, and identified the voice to be that of the defendant. (Tr. 16). Agent Lometti then testified that he had previously identified Valle's voice from a tape recording containing a voice line-up consisting of six males with Spanish accents repeating the same phrase. (Tr. 17, 18; GX 5).

Prior to Lometti's cross-examination, the Government consented to a defense request that Government's Exhibit 5, the voice line-up, be played for the jury. (Tr. 19).* However, when the tape was played, the cassette jammed and cross-examination was temporarily halted pending repair of the tape or replacement by a duplicate tape. (Tr. 20-23). Defense counsel informed the Court that another copy of the tape existed and was in his possession (Tr. 20, 21), and then suggested that, in the event the duplicate tape was not found and the original could not be repaired, the testimony of Agent Lometti be stricken. (Tr. 21-22).

---

* This tape had been played twice for the Court during a suppression hearing on December 1, 1975. (Tr. 21). At the conclusion of the hearing, the Court concluded that the voice lineup was not unduly suggestive.

The Court then instructed the jury,* without objection,** that it should only provisionally consider the agent's direct testimony pending a determination of whether the original tape could be repaired or replaced. (Tr. 24-25).

On the following day, it was determined that the tape was irreparably damaged and that the defense in fact had no duplicate copy. (Tr. 47). Valle then moved for

---

* The Court instructed the jury:

"The Court: Ladies and gentlemen, we have had some mechanical difficulty with this tape which we are going to try to clear up after the session today.

In the meantime this witness has not concluded his testimony. The defendant has a right to cross examine him and he has not yet done so because having called for a playing of the tape as a preliminary and the tape having gotten itself jammed in some way, we are at an impasse.

So you will, for the present, consider whatever the witness has told you thus far only provisionally, this witness. It may be that if they can't get the tape straightened out that I will have to strike out all of his testimony, at which time you will have to eradicate it from your mind as if you have never heard this particular witness. That will not bear on other portions of the case, but it has to do with this witness because this witness' testimony has not been completed.

So it has only been given to you very provisionally and subject to a motion to expunge it from the record if we can't get the tape straightened out overnight.

With that instruction I am going to withdraw the witness from the stand and we will proceed with the trial with other proof at the present time." (Tr. 24-25).

** The defendant's claim that an objection was made is not borne out by the record. (Br. at 14). Immediately after the above instruction was given the Court inquired:

"The Court: Does that clear it up Mr. Cohen?

Mr. Cohen: Thank you, Your Honor.

The Court: You thank me but does that clear it up?

Mr. Cohen: It does indeed." (Tr. 25).

a mistrial and that motion was denied. The Court then granted, without Government objection, defendant's motion to strike the entire testimony of Agent Lometti. The court then instructed the jury to completely disregard Lometti's testimony.*

It is well settled that when inadmissible evidence has been heard by the jurors, the error is ordinarily to be cured by the Court instructing them that the evidence is to be entirely disregarded; only when the evidence is so prejudicial that it is unlikely that the jurors will be capable of erasing the matter from their consciousness is a mistrial mandated. See *United States* v. *Bynum*, 485 F.2d 490, 503 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *United States* v. *Plante*, 472 F.2d 829, 831 (1st Cir.), *cert. denied*, 411 U.S. 950 (1973); *United States* v. *Bergman*, 354 F.2d 931 (2d Cir. 1966); *United States* v. *Stromberg*, 268 F.2d 256, 269 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959);

---

* The court stated:

"Unfortunately we have not been able to correct the defect in the tape that was to have been played esterday, and for that reason, and since the counsel has no had an opportunity to cross examine the witness, I am now directing you to erase completely from your minds the fact that this man appeared here as a witness and everything and anything that he had to say. I am talking about the witness William V. Lometti. It shall play no part in this case. It will have nothing to do with this case. It is not to be referred to in any way in your deliberations. It is to be struck out, and I am now striking out all of that testimony completely.

The rule of law is that a witness may be questioned not only on direct examination but on cross-examination, and since this misfortune has occurred where we cannot complete his cross-examination in accordance with the proper wishes of counsel, I strike it out from the record as though it never appeared here and never occurred. Please pay close attention to that instruction." (Tr. 50).

United States v. *Giallo*, 206 F.2d 207, 210 (2d Cir.), *aff'd*, 346 U.S. 929 (1953); *United States* v. *Tomaiolo*, 249 F.2d 683, 695 (2d Cir. 1957). Since the trial judge is in the best position to assess the impact that the inadmissible evidence has had on the jury, he is given broad discretion to determine whether a mistrial is necessary, and his decision will only be reversed on appeal if he has clearly abused that broad discretion. *United States* v. *Calabro*, 467 F.2d 973, 987 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States* v. *Marshall*, 458 F.2d 446, 451 (2d Cir. 1972); *United States* v. *Kompinski*, 373 F.2d 429, 432 (2d Cir. 1967).

Here, it is crystal clear that the Court did not abuse its discretion in denying defendant's motion for a mistrial, since what there had been of Lometti's testimony could have had little impact on the jury and there was no reason to believe that the jury would be incapable of abiding the Court's curative instruction. Agent Lometti's testimony that he recognized the defendant's voice on Government Exhibit 1 could ultimately have added little to the jurors' views of the case, since they had an opportunity to make the same comparison themselves by listening to exemplars of Valle's voice, the tape of the phone call and a composite tape matching segments of the exemplars with phrases from the phone call. (Tr. 51; GX 1, 2, 3). The testimony of Agent Lometti that he had previously picked the defendant's voice out of a voice line-up, moreover, was surplusage, the only function of which was to fortify his testimony concerning his recognition of Valle's voice. Since the agent's testimony did little more than what the jury did themselves, namely, compare the voice of Carlos Valle with that of the unknown caller, its impact was not so prejudicial that an instruction to disregard it could not cure it. Indeed, in referring to Agent Lometti's testimony, Judge Pollack noted: "I don't think the testimony has any basic impact." (Tr. 22).

POINT III

The District Court properly instructed the jury with respect to the defendant's statements.

Valle argues finally that the District Court erred when it instructed the jury that the defendant's failure to sign a waiver form at the time of his interview by federal agents in no way foreclosed the agents from questioning him. Specifically, he contends that defense counsel at no time suggested that the agents were acting unlawfully in questioning Valle and that the "gratuitous" instructions of the Court "underscored the importance of [Valle's] statements and portrayed them with a significance implying that defense counsel had attempted to impart to the jury that [Valle] believed he had been damaged by his own admissions." (Br. at 17). This claim is frivolous.

There was no dispute at trial that before Valle was questioned by federal agents, he had been informed of his constitutional rights orally, and had read the printed rights form itself and that he had then stated that he understood his rights. He then signed the top half of the form indicating that he had read and understood his rights. (Tr. 28, 31-34; GX 6). The record also plainly indicates that during the cross-examination of Agent Warfield, one of the interviewing officers, defense counsel impliedly criticized Warfield for continuing to question Valle after Valle had declined to sign the waiver of rights on the bottom half of the form. (Tr. 32, 33, 34, 41, 42).

The obvious purpose of this defense tactic seemed to be to have the jury infer that the agents were under an obligation to obtain a signed waiver of rights and that their continued interrogation of the defendant was at best done in bad faith, if not illegally.

Indeed, after Warfield's cross-examination, Judge Pollack noted:

> ". . . I permitted you, I think possibly prejudicially to the Government interests, to go into the notion of the failure to sign a waiver when there is no evidence in this record whatsoever to warrant anything other than a voluntary interview and voluntary statement with the misimpression to confuse the jury that there is some requisite, legally, for a signature to waiver. And I will have to give consideration to an appropriate charge in that regard." (Tr. 46).

Following this statement by the Court, the defendant changed his tactic only slightly in summation. Defense counsel asked the jury not to disregard the statements made to the agent, but to look at the statements in a "special light" as a "police practice which is to be abhorred." (Tr. 63, 64). The defense then told the jury that the defendant was questioned after he had failed to sign the bottom half of the form because the agent "had some axe to grind." (Tr. 64).

After summation, the Court's instructions to the jury included the following:

> "Before being questioned by Government representatives, according to the Government witness, the defendant was read, and in writing acknowledged having received a statement of his legal rights. That was what he was entitled to. The Government was not also obligated to obtain a signed waiver. That was optional with the defendant. There was no evidence that the defendant refused to waive his rights. The testimony indicated that he declined to also sign a waiver. No evidence indicates that his statements to the agents were not voluntarily given and made at the inter-

> view. The jury may consider the alleged statements of the defendant, if it believes that they were made on the interview, as part of the circumstances bearing on his alleged motive and intent." (Tr. 81, 82).

The defense, having raised the issue of the propriety of continuing to question Valle after he had declined to sign the waiver, can not be heard to complain because the District Court found it necessary in its charge to correct the misimpressions thereby created. There was simply no requirement that the Government obtain the defendant's signature on the waiver form in order to permit continued questioning or the introduction of his statements into evidence. *United States* v. *Cassino*, 467 F.2d 610, 620 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); *United States* v. *Speaks*, 453 F.2d 966, 968-69 (1st Cir. 1971), *cert. denied*, 405 U.S. 1071 (1972); *United States* v. *Crisp*, 435 F.2d 354, 358 (7th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971).

Valle suggests, as he did below, that the defense tactic was not to suggest that the agents were acting illegally, but rather to suggest that the agent's decision to continue the questioning after Valle declined to sign the waiver indicated some animus toward Valle. (Br. at 16-17). This representation of counsel's intent hardly demonstrates the impropriety of the court's instruction. First, even if Valle was pursuing a separate line of argument, his questioning of Agent Warfield suggested, whether intentionally or not, the impropriety of the Government's conduct. In that circumstance, the court was acting well within its discretion in seeking to dispel the innuendo presented by the questioning. It mattered not whether defense counsel had intended his questioning to be understood as an attack on the agent's conduct; what mattered was that the suggestion had been left with the jury. Secondly, the instruction would have been entirely

proper even if defense counsel's sole suggestion to the jury had been that the continued questioning indicated the animus of the agents; for surely this argument suggested that there were good reasons to stop the questioning after Valle had declined to sign the waiver. The Court, in that circumstance, could properly instruct the jury that there were no legal impediments to continued questioning.

Finally, Valle's contention that the Court's instructions put undue emphasis on the post-arrest statements and implied that the defendant himself believed that great damage had been done to his cause by his admissions is utter nonsense. Even the most strained reading of the Court's charge discloses that nothing of the sort was done by the District Court's instructions.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ROBERT J. COSTELLO,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1976—614—350—626

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Robert J. Costello being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 22 day of March, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Frederick H.Cohn
299 Broadway
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Robert J. Costello

Sworn to before me this

22nd day of March, 1976

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977